Hello Folks and welcome back to the Good Judge-Ment podcast. I am Wade Padgett.

*And I am Tain Kell. We really appreciate you listening to the Good Judge-Ment Podcast.*

Absolutely! But Tain, today’s episode is going to involve me confessing that occasionally you and I are less than perfect…

*Speak for yourself! No seriously, Wade and I are annually involved with teaching at New Judge’s Training and we spend lots of time researching and writing for the podcast. These projects help both of us look at the law and think about how we do things in court. Just like all judges, we try to do things correctly when we are on the bench but, occasionally, we also get things wrong.*

That’s true. Today’s episode is going to address U.S.C.R. 33.5 which makes it clear that judges are not to participate in plea discussions. I think everyone knows that and I would venture a guess that judges do not affirmatively try to get involved with plea discussions. But sometimes we use sloppy language or make other inadvertent misstatements that could run afoul of this rule.

And before we proceed, we need to remind everyone of our disclaimer which we have not restated in a while. The cases we discuss on this podcast usually involve our friends and colleagues on the bench. We are never, ever attempting to embarrass any judge (or anyone else for that matter). But we can all learn from the collective experiences of our brothers and sisters on the bench.

*A few weeks ago, we discussed “judicial comments” which prohibit judges from making certain comments in the presence of the jury. Wade even was a presenter on that topic during the video series that was recently made available to Superior Court judges as part of the Winter Conference that we had to conduct virtually. Today’s episode deals with a different issue but both topics have some similarities in that judges can inadvertently find themselves running afoul of the rules.*

*But let’s get right to it. What does U.S.C.R. 33.5 say Wade?*

**Rule 33.5. Responsibilities of the Trial Judge**

(A) The trial judge should not participate in plea discussions.

**Seems self-evident. But there is more:**

(B) If a tentative plea agreement has been reached, upon request of the parties, the trial judge may permit the parties to disclose the tentative agreement and the reasons therefor in advance of the time for the tendering of the plea. The judge may then indicate to the prosecuting attorney and defense counsel whether the judge will likely concur in the proposed disposition if the information developed in the plea hearing or presented in the presentence report is consistent with the representations made by the parties. If the trial judge concurs but the final disposition differs from that contemplated by the plea agreement, then the judge shall state for the record what information in the presentence report or hearing contributed to the decision not to sentence in accordance with the plea agreement.

[The rule tells us not to participate but then gives this “window” for limited participation]

**Judge participation in plea negotiation potentially makes the plea involuntary**

Guilty pleas must be knowingly and voluntarily entered. When the trial judge gets involved with plea negotiations, the voluntariness of the defendant’s plea comes into question.

“’Judicial participation in the plea negotiation process is prohibited by court rule’ in this state and ‘is prohibited as a constitutional matter when it is so great as to render a guilty plea involuntary.’” *McCranie v. State*, 335 Ga. App. 548, 551 (2016) overruled on other grounds by *Collier v. State*, 307 Ga. 363 (2019)

(our old friend *Collier* which really addressed advising defendants who enter guilty pleas that they have the right to appeal)

“Due to the ***force and majesty*** of the judiciary, a trial court's participation in the plea negotiation may skew the defendant's decision-making and render the plea involuntary because a defendant may disregard proper considerations and waive rights based solely on the trial court's stated inclination as to sentence. *McDaniel v. State*, 271 Ga. 552, 554 (1999); also in *McCranie*, supra.

**But that does not mean that the judge must remain mute**

“’Judicial participation in the plea negotiation process is prohibited by court rule in this state....’ However, if the parties negotiate a tentative plea agreement, a trial court may indicate whether it will concur with the agreement. What is prohibited is when a trial court involves itself in plea negotiations so as to render a guilty plea involuntary. Thus, while a trial court may communicate its willingness to accept a particular plea agreement independently negotiated by the parties, it is inappropriate for the trial court to tell a defendant that a rejection of a plea proposal will result in greater punishment in the event of a conviction by a jury.” *Works v. State*, 301 Ga. App. 108, 111 (2009) (The trial judge stated that due to the severity of the charges, she would not accept the recommendation. The trial judge then stated that she would accept a plea recommendation of fifteen years to serve ten years, which Works had already declined. These actions do not amount to improperly engaging in plea negotiations)

Where judge asks prosecutor whether the plea offer that has been made would continue to be available after the suppression hearing was concluded, that is not improper. *Grant v. State*, 246 Ga. App. 376, 377 (2000).

Where plea negotiations break down between the parties, it is permissible for the trial judge to inform the defendant of his/her resulting options: enter non-negotiated plea (a/k/a blind plea) or go to trial. That is merely advising the defendant of his/her options. *Brassfield v. State*, 242 Ga. App. 747 (2000).

**Advising defendant of maximum possible sentence is not the same as “threatening” the max sentence**

[*I always advise defendants of the maximum possible sentence that could be imposed and put any plea offer on the record. Not sure if you do the same.*]

Although this episode is focused on U.S.C.R. 33.5, be aware that U.S.C.R. 33.8 lists the issues that the trial judge must detail in a plea colloquy. One of those issues is the max possible sentence

And I always want to ensure that any defendant deciding whether to take a plea offer or go to trial understands exactly what is at stake. We are required to advise defendants that where there is a recidivist notice that is not waived as part of the plea negotiations, that notice will impact his/her parole eligibility. *Alexander v. State*, 297 Ga. 59 (2015).

So I sincerely put the max sentence on the record before any trial and definitely when going through a plea colloquy. Not only because it is required but because it is only fair to ensure the defendant is fully aware of what he/she is dealing with when making these decisions.

Although it may seem hard to believe, there are occasions when defense counsel has forgotten or failed to convey a plea offer. Or, the lawyer has not documented that the plea offer was conveyed and rejected when there is an appeal or claim of ineffective assistance of counsel.

“Telling a defendant that he *could be* sentenced to *up to* 20 years is not the same as telling a defendant that he *would be* sentenced to 20 years. Second, the trial court informed Hayes that if he went to trial he would be facing 20 years and would serve every day of it *if* he were found guilty *and* sentenced to 20 years. Both statements are clearly conditional, and explain the *maximum* sentence that Hayes could face upon conviction.” *State v. Hayes*, 301 Ga. 342, 345 (2017).

“But there is no constitutional violation when a judge gives an “explanation of the potential maximum sentence [that] [i]s carefully expressed in conditional language, avoiding any positive statement of what sentence might be imposed after a trial or plea,” and there is otherwise no record evidence that the defendant was coerced or that the plea was involuntary.” *Kennedy v. Hines*, 305 Ga. 7, 10 (2019).

Earlier we discussed the use of “sloppy” phrasing on the record and how that can really change the outcome of some of these appeals. The appellate courts have agreed:

“Let us be plain: if a trial judge communicates—either explicitly or implicitly—to a criminal defendant that his sentence *will* be harsher if he rejects a plea deal and is found guilty at trial, then Rule 33.5 (A) has been violated and the plea may be found involuntary.” *Winfrey v. State*, 304 Ga. 94, 98 (2018)

“First, the trial court informed Hayes that *if* he were found guilty and sentenced, he *could be* facing *up to* 20 years, and, because of his recidivist status, *if* he were sentenced to 20 years he would serve every day. Telling a defendant that he *could be* sentenced to *up to* 20 years is not the same as telling a defendant that he *would be* sentenced to 20 years. Second, the trial court informed Hayes that if he went to trial he would be facing 20 years and would serve every day of it *if* he were found guilty *and* sentenced to 20 years. Both statements are clearly conditional, and explain the *maximum* sentence that Hayes could face upon conviction.” “[T]he trial court’s careful and repeated use of conditional language distinguishes this case from previous decisions in which we found impermissible interference in the negotiation process.” *State v. Hayes*, 301 Ga. 342, 345 (2017)

**Discussing a “trial tax” is simply improper**

We discussed the concept of a “trial tax” in a prior episode. But to make sure we are all aware of the meaning of the phrase, a “trial tax” is the situation where a judge advises a defendant that if he/she exercises his/her right to a jury trial and is convicted that the judge would impose a more severe sentence than was offered in the plea negotiations.

Failure to take responsibility for your actions is much different than “costing the taxpayers money” or “putting the State to the test” when discussing these issues.

In *Gibson v. State*¸281 Ga. App. 607, 609-610 (2006), the trial judge told the defendant that if he went to trial and “cost the taxpayers money,” that the sentence imposed would not be the same as the one being offered by the prosecutor pre-trial. Reversed.

*Skomer v. State*, 183 Ga. App. 308, 310 (1987), trial judge telling defendant that the rejection of the plea offer *will* result in a greater punishment if convicted was improper.

**Some Examples:**

Some are obvious and some are more subtle

**From *McCranie v. State*, supra at 548-549.**

“The trial court, however, made clear that it wanted McCranie to have a sentence of at least 30 years. The following exchange then occurred:

[COUNSEL]: The Judge is not going to do the plea offer. It's thirty serve ten versus twenty serve ten. You can withdraw your plea and go to trial.

[MCCRANIE]: What would I get if I went to trial?

THE COURT: Why don't you try it and let's see.

[MCCRANIE]: I don't want to try it.

Trial counsel then advised McCranie that the maximum possible aggregate sentence he could receive was 50 years.”

“The trial court then offered a sentence of thirty years, with ten years to serve, but indicated that it would only accept McCranie's plea if the victim's mother agreed to it. The trial court stated, ‘You ain't walking out of this courtroom with less [than] thirty. I know it don't bother you. Why don't I make it life?’ Later, the trial court told McCranie, ‘I'll be glad for you to go to trial because I promise you I'll be your judge.’”

**From *Pride v. Kemp*, 289 Ga. 353 (2011)**

Plea offer presented in case involving allegations of rape, aggravated assault and cruelty to children between spouses. Plea agreement presented of 13 in, 7 out with come reductions in charges and the trial judge rejected the plea.

As part of the exchange, the judge questioned why the defendant should receive less than 20 years to serve, given the severity of the charges. The judge indicated that there was nothing wrong with the case from what the judge knew and if the case was tried and the defendant was found guilty, the judge would “give him the maximum. I would stack the sentences.”

After discussion where the prosecutor indicated that there was a desire to keep the children from having to testify, the judge said, “give him 18 years – that is rock bottom – and I am happy to try him [in five days] and ready to go and he is going to get a lot more. I would really much rather try him, frankly, so I can give him what I would really like to give him.”

**From *McDaniel v. State*, 271 Ga. 552, 553-554 (1999)**

In a death penalty case, the defendant was considering entering a plea and allowing the trial judge to impose sentence. The judge advised the parties that he/she “was 90% certain that I would impose a life without parole sentence.” Defendant entered the plea and after a sentencing hearing, the same judge sentenced the defendant to death. That plea was found to be involuntary.

**My recent example**

At the beginning of this episode, I indicated that I may have been guilty of violating this rule. I want to explain. In a recent appellate opinion that is not officially reported (I am confessing to something that only I and the parties would know about), the defendant claimed that I was impermissibly involved with plea negotiations.

And this case is representative of several other cases that make a good point for judges to keep in mind on this topic.

I was attempting to make the record as to any plea offer that might be available in a case where the defendant was charged with an offense that carried a very significant potential sentence AND the state had given recidivist notice.

I asked the state whether they were making an offer on the date of the trial or not. The prosecutor put a plea offer on the record and the defendant rejected the offer. The offer was more favorable than a prior offer they had made and which was rejected. Case was tried and the defendant was convicted on one count and acquitted on another count.

The appellate court said that “harm as well as error must be shown to warrant reversal. In this case, [defendant] rejected the State’s revised and more favorable plea offer. Thus, pretermitting whether the trial court inappropriately participated in plea negotiations, [defendant] does not show harm because the court’s participation did not result in an involuntary guilty plea.” citing *Bell v. State*, 219 Ga. App. 553, 554 (1995) and *Winfrey v. State*, 304 Ga. 94, 97 (2018).

The larger point is: 1) I was not reversed; and 2) if the “alleged participation” did not result in a guilty plea being entered, it cannot be said the judge caused an involuntary plea to be entered.

Thank you for listening to the Good Judge-Ment Podcast. We have flippantly mentioned a few times that having your words taken down by a court reporter is a humbling experience. But making the record clear is vitally important.

*Make sure you never become involved in the plea negotiation process. You can (and must) advise defendants of maximum potential sentences. You are allowed to let the parties know whether you will accept a tendered plea negotiation. But do not counter-offer. Let the parties negotiate the plea agreement and then rule on what they negotiate.*

As we have noted, this episode was the product of requests made by our listeners. Please continue to help us help you by providing input and suggestions for episode topics at [goodjudgepod@gmail.com](mailto:goodjudgepod@gmail.com). You can visit our website, goodjudgepod.com for the episode notes from this and all other episodes.

*Again, thanks for listening to the Good Judge-Ment Podcast. And remember, sometimes it is better to remain silent and let people think you are a fool than to speak and prove their point.*